Eight Mile Style, LLC et al v. Apple Computer, Incorporated
Doc. 45 Att. 4

EXHIBIT 3

Rule 26(f) report with defendants' request for bifurcation in *Fharmacy Records v. Simmons*, No. 05-72126, Docket No. 68 (E. D. Mich. Feb. 27, 2006)

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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

FHARMACY RECORDS a/k/a
FHARMACY RECORDS PRODUCTION CO.,
FARM I PUBLISHING CO.
and SHELTON RIVERS,

Plaintiffs,

Hon. Victoria A. Roberts

v.

Case No. 05-72126

EARL "DMX" SIMMONS, SALAAM NASSAR,
DAVID STYLES p.k.a. "D. STYLES",
CURTIS JACKSON p.k.a. 50 CENT,
DARRIN "DEE" DEAN, DEF JAM RECORDING,
RUFF RYDERS, BOOMER X PUBLISHING, INC.,
DEAD GAME PUBLISHING, JUSTIN COMBS PUBLISHING,
PANIRO'S PUBLISHING, UNIVERSAL MUSIC PUBLISHING,
UNIVERSAL MUSIC & VIDEO DISTRIBUTION CORP.,
EMI APRIL, INC., SOO SOO'S SWEET SWISHER MUSIC,
And JOHN DOES, AGENTS and ATTORNEYS,

Defendants.

____/

RULE 26(f) REPORT

RULE 26 CONFERENCE: On February 24, 2006, counsel for the parties conferred regarding the issues identified under Fed. R. Civ. P. 26(f) and pursuant to this Court's Notice of FRCP 16(b) Status and Scheduling Conference.

BACKGROUND OF THE ACTION: Plaintiffs have filed a copyright infringement action pursuant to the *Copyright Act of 1976*, 17 U.S.C. §101 *et seq.* Plaintiffs allege that a musical composition entitled "Shot Down" from the 2003 DMX album *Grand Champion*, allegedly performed by DMX and David Styles, infringes upon the alleged copyright to

Plaintiffs' alleged musical composition, entitled "ESS Beats". More specifically, Plaintiffs assert "fragmented literal similarity", see *Nimmer on Copyright*, § 13.03[A][2] at 13-46. Plaintiffs allege that there is verbatim similarity between Plaintiffs' and Defendants' alleged works. Plaintiffs claim that Defendants' alleged work contains a copy of a continuous loop of Plaintiffs' music.

Plaintiffs have sued the alleged performers, songwriters, producers and record labels who have allegedly publicly performed, copied, manufactured, distributed and sold recordings containing their alleged musical composition, "ESS Beats", without their authorization. Plaintiffs allege that this violates their alleged exclusive rights under Section 106 of the Copyright Act.

The following Defendants have appeared thus far in this action: Curtis Jackson p/k/a "50 Cent", The Island Def Jam Music Group, a division of UMG Recordings, Inc. (referred to in the caption as "Def Jam Recordings"), Universal Music Group, Inc., Universal Music & Video Distribution, Corp. (Jackson, Def Jam, and the UMG entities are collectively referred to as the "UMG Defendants"), Salaam Nassar, EMI April Music, Inc. and Janice Combs Publishing, Inc. d/b/a Justin Combs Publishing.

The Court has dismissed all remaining, unserved Defendants without prejudice, and Plaintiffs will seek to join those parties to this case.

Defendants assert that Plaintiffs' Complaint has not clearly identified the theory of infringement. Therefore, Defendants have interposed a variety of defenses, including but not limited to: (1) lack of access to Plaintiffs' alleged work; (2) lack of substantial similarity between the works; (3) independent creation of Defendants' work; (4) fair use; (5) *de minimis* use; (6)

absence of sufficient creative authorship of Plaintiffs' work to be protected under the Copyright Act; and (7) waiver, estoppel and laches.

Defendant Janice Combs Publishing, Inc. d/b/a Justin Combs Publishing has asserted an indemnification cross-claim against the remaining Defendants, which has been denied.

PROPOSED AMENDMENTS TO PLEADINGS: Plaintiffs reserve the right to seek amendment to their pleadings if, through discovery, additional claims or parties are revealed. Defendants also reserve their right to seek amendments to the pleadings if, through discovery, additional claims or counterclaims become necessary.

ADMISSIONS OF FACTS/STIPULATIONS TO AUTHENTICITY OF DOCUMENTS: The parties seek none at this time given the status of the litigation.

DEPOSITIONS: Plaintiffs anticipate requiring the depositions of (1) the alleged musical producers and composers of the underlying music contained in Defendants' alleged work "Shot Down", (2) corporate representatives for the Defendant record labels and publishing companies responsible for securing proper copyright clearances for sampled music, (3) corporate representatives from the Defendant record companies and publisher responsible for keeping financial records of the revenue stream generated from the sale and licensing of the musical composition, "Shot Down", as well as the album, *Grand Champ*, (4) corporate representatives from the Defendant record labels with information about the number of units of "Shot Down" and *Grand Champ* that have been manufactured, and (5) Plaintiffs' and Defendants' liability and damages experts. Plaintiffs reserve the right to seek leave to conduct more than 10 depositions but do not anticipate that each deposition will last longer than seven hours.

Defendants anticipate requiring, at a minimum, the depositions of (1) Plaintiff Shelton Rivers, (2) the corporate representatives of Plaintiff Fharmacy Records a/k/a Fharmacy Records

Production Co., and Plaintiff Farm I Publishing Co., and (3) any experts retained by Plaintiffs. Defendants do not believe that they will require more than ten depositions each in this case; however, in light of the number of parties names by Plaintiffs, Defendants reserve the right to take depositions that may last longer than seven hours in order to accommodate the questioning of counsel for each party.

INTERROGATORIES: The parties do not anticipate seeking leave to serve more than twenty-five (25) interrogatories.

EXPERT TESTIMONY: Plaintiffs anticipate requiring experts in the following areas: (1) musicology and (2) damages. Defendants anticipate requiring experts in the following areas: (1) musicology; (2) sound/recording engineering; and (3) damages.

BIFURCATION: The UMG Defendants and Justin Combs Publishing, Inc. assert that copyright infringement cases have little to no overlap of the factual issues concerning infringement and damages. Thus, these Defendants will request bifurcation of trial between liability and damages pursuant to Fed. R. Civ. P. 42(b). Defendant EMI April Music, Inc. does not object to this request. Plaintiffs do not concur, claiming that there is substantial overlap between the liability and damages issues in this case. Plaintiffs claim that the defense of laches impacts both liability and damages. Plaintiffs allege that they would be prejudiced by bifurcation, as they expect to prevail on liability and seek to avoid a second trial on damages.

DISCOVERY DISPUTES: Pursuant to UMG Defendants' and Justin Combs Publishing's' request for bifurcation, the UMG Defendants and Justin Combs Publishing object to discovery on Plaintiffs' alleged damages in the absence of a finding of liability. Defendant EMI reserves the right to object to discovery but believes it is premature to identify potential areas of dispute at this time. As stated above, Plaintiffs do not concur with the bifurcation request.

INITIAL DISCLOSURES: The parties agree to exchange initial disclosures under Rule 26(a)(1) by March 10, 2006.

DISCOVERY MANAGEMENT PLAN:

(1) Witness List Exchange

(a) Plaintiffs' proposal: Exchange of witness lists, identifying both fact and expert witnesses, by April 3, 2006;

(b) Defendants' proposal: Exchange of witness lists identifying both fact and expert witnesses by June 3, 2006;

(2) Plaintiffs' Expert Reports

(a) Plaintiffs' proposal: Plaintiffs submit their expert reports by June 3, 2006;

(b) Defendants' proposal: Plaintiffs' submit their expert reports (excluding damages if the Court bifurcates at the request of the UMG Defendants and Justin Combs Publishing) by July 3, 2006;

(3) Defendants' Expert Reports

(a) Plaintiffs' proposal: Defendants submit their expert reports by July 3, 2006

(b) Defendants' proposal: Defendants submit their expert reports (excluding damages if the Court bifurcates at the request of the UMG Defendants and Justin Combs Publishing) by August 3, 2006;

(4) Discovery Cutoff

(a) Plaintiffs' proposal: Discovery completion by August 15, 2006.

(b) Defendants' proposal: Discovery completion by September 15, 2006.

(5) Plaintiffs' propose that if the parties stipulate to state court case evaluation (per E.D. Mich. L.R. 16.3), said stipulation shall be submitted by August 15, 2006.

(6) Dispositive Motions

(a) Plaintiffs' proposal: Filed by September 15, 2005;

(b) Defendants' proposal: Filed by October 15, 2006.

STATE COURT CASE EVALUATION: Defendants do not consent to imposition of costs and sanctions if the case is referred to state court case evaluation under E.D. Mich. L.R. 16.3 and do not consent to state court case evaluation.

POSSIBLE RESOLUTION: The parties remain open to the possibility of resolution.

Respectfully Submitted,

GREGORY J. REED & ASSOC., P.C.
By: with consent of Gregory J. Reed
Gregory J. Reed (P24750)
Attorneys for Plaintiffs
1201 Bagley
Detroit, MI 48226
(313) 961-3580
gjrassoc@aol.com

DICKINSON WRIGHT PLLC
By: /s/ Michael D. Socha
Daniel D. Quick (P48109)
Michael D. Socha (P64668)
Attorneys for the The Island Def Jam Recordings, a division of UMG Recordings, Inc., Universal Music Group, Inc., Universal Music & Video Distribution, Corp., and Curtis Jackson
38525 Woodward Ave., Suite 2000
Bloomfield Hills, MI 48304
(248) 433-7200
dquick@dickinsonwright.com
msocha@dickinsonwright.com

By: with consent of Stephanie L. Hammonds
Stephanie L. Hammonds (P48097)
Attorneys for Plaintiffs
719 Griswold, Suite 820
Detroit, MI 48226
(313) 340-0440
slynn629@aol.com

BUTZEL LONG, PC
By: /s/ with consent of Deborah J. Swedlow
J. Michael Huget (P39150)
Deborah J. Swedlow (P67844)
Attorneys for EMI April Music, Inc.
350 S. Main St., Ste 300
Ann Arbor, MI 48104
(734) 995-3110
huget@butzel.com
swedlow@butzel.com

PLUNKETT & COONEY, P.C.
By: /s/ with consent of John W. Martin, Jr.
John W. Martin, Jr. (P42266)
Attorneys for Janice Combs Publishing d/b/a

Justin Combs Publishing
38505 Woodward Ave.
Bloomfield Hills, MI 48304
(248) 901-4000
jmartin@plunkettcooney.com

Dated: February 27, 2006

CERTIFICATE OF SERVICE

I hereby certify that on **February 27, 2006** I electronically filed the foregoing document with the Clerk of the Court using the ECF system which will send notice of such filing upon all counsel of record:

Gregory J. Reed (P24750)
GREGORY J. REED & ASSOC.
Attorneys for Plaintiffs
1201 Bagley Ave.
Detroit, MI 48226
(313) 961-3580
GJREEDASSOC@aol.com

J. Michael Huget (P39150)
Deborah J. Swedlow (P67844)
BUTZEL LONG, PC
Attorneys for EMI April Music, Inc.
350 S. Main St., Ste 300
Ann Arbor, MI 48104
(734) 995-3110
huget@butzel.com
swedlow@butzel.com

Stephanie L. Hammonds (P48097)
Attorneys for Plaintiffs
719 Griswold, Suite 820
Detroit, MI 48226
(313) 340-0440
slynn629@aol.com

John W. Martin, Jr. (P42266)
PLUNKETT & COONEY, P.C.
Attorneys for Janice Combs Publishing d/b/a Justin Combs Publishing
38505 Woodward Ave.
Bloomfield Hills, MI 48304
(248) 901-4000
jmartin@plunkettcooney.com

/s/ Michael D. Socha
Daniel D. Quick (P48109)
Michael D. Socha (P64668)
Attorneys for the Universal Music Group, Inc., Universal Music & Video Distribution, Corp., and Curtis Jackson
38525 Woodward Ave., Suite 2000
Bloomfield Hills, MI 48304-2970
(248) 433-7200
dquick@dickinsonwright.com
msocha@dickinsonwright.com

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